

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LUCILLE M. AUSTIN and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Miami, Fla.

*Docket No. 97-2488; Submitted on the Record;
Issued May 19, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs' denial of appellant's request for a hearing pursuant to section 8124 of the Federal Employees' Compensation Act constituted an abuse of discretion.

On May 18, 1987 appellant, then a 30-year-old mailhandler, filed a notice of traumatic injury and claim, alleging that she sustained an injury to her lower right abdominal area while helping a driver take mail out of a postal truck. Appellant stopped work on that day and return to work on May 27, 1988. The Office accepted appellant's claim for low back strain. On March 27, 1988 appellant filed a claim for recurrence of disability beginning March 10, 1988. She returned to work on March 20, 1988. On August 5, 1988 appellant went to an emergency room for treatment in relation to a second claimed recurrence of disability. By decision dated November 2, 1988, the Office accepted the August 1988 recurrence of disability and appellant received appropriate compensation. In a decision dated January 13, 1989, the Office terminated appellant's compensation on the grounds that disability on or after November 16, 1988 was not related to her accepted May 18, 1987 employment injury. Appellant filed additional claims for continuing compensation subsequent to the Office's January 1989 decision and did not return to work. By decision dated May 18, 1990 and finalized May 21, 1990, an Office hearing representative found that, although the Office properly terminated appellant's monetary compensation, it did not meet its burden of proof in terminating appellant's medical benefits. The January 13, 1989 decision of the Office was modified to find that appellant was entitled to continuing medical treatment by Dr. Barry J. Silverman, appellant's treating physician and an orthopedist.

In letters dated July 31, September 17 and November 29, 1990, appellant requested authorization to change her physician of record from Dr. Silverman to Dr. William Bacon. By letter dated December 12, 1990, the Office advised her that she could continue treatment with Dr. Bacon at her expense and noted that it would continue to be responsible for treatment by Dr. Silverman. However, in a decision dated June 11, 1991, the Office granted appellant's

request for reconsideration and modified the May 21, 1990 decision of the Office hearing representative to authorize medical treatment by Dr. Jay Stein for her accepted employment injury.¹

In a letter dated February 3, 1997, appellant requested an oral hearing. She indicated that she sustained an aggravation of her accepted employment injury on January 5, 1995 and wrote “RECURRENCE -- DOI: January 5, 1995” at the top of her letter. By decision dated April 18, 1997, the Office denied appellant’s request for a hearing on the grounds that reconsideration was previously requested and a decision issued pursuant to section 8128 of the Act and that reconsideration could again be requested with submission of relevant evidence.

The Board has carefully reviewed the entire case record on appeal and finds that the Office properly denied appellant’s request for a hearing.²

Section 8124(b)(1) of the Act provides: “Before review under section 8128 of this title, a claimant for compensation not satisfied with the decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.”³ Thus, appellant must request a hearing within the provided time limitation before she requests reconsideration or she is not entitled to a hearing as a matter of right.⁴ In this case, appellant requested and a decision was issued in relation to her request for reconsideration regarding her treating physician of record prior to filing a request for a hearing. In addition, although appellant’s February 1997 letter suggests that she filed a claim for recurrence on January 5, 1995 and that, therefore, there might be an intervening claim or decision, the record is devoid of a claim for recurrence of disability beginning January 5, 1995 or any decision thereon. Therefore, appellant is not entitled to hearing as a matter of right.

Even when the hearing request is not timely, the Office has discretion to grant the hearing request and must exercise that discretion. In this case, the Office advised appellant that it considered her request in relation to the issue involved, and the hearing was denied on the basis that she could address this issue by submitting evidence which showed that modification of the prior decision was warranted. Appellant was advised that she may request reconsideration with additional evidence. The Board has held that an abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.⁵ There is no evidence of an abuse of discretion in the denial of a hearing in this case.

¹ Appellant continued medical treatment with Dr. Stein and subsequently with Dr. Carol Vandenakker.

² The Board’s jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed her appeal with the Board on July 22, 1997, the only decision before the Board is the Office’s April 18, 1997 decision; *see* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

³ 5 U.S.C. § 8124(b)(1).

⁴ *See Mary G. Allen*, 40 ECAB 190 (1988).

⁵ *Daniel J. Perea*, 42 ECAB 214 (1990).

The decision of the Office of Workers' Compensation Programs dated April 18, 1997 is hereby affirmed.

Dated, Washington, D.C.
May 19, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member